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Ng Kong Onn & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor

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HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO WA-25–434–07 OF 2022
AMARJEET SINGH J
6 FEBRUARY 2024

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Civil Procedure — Judicial review — Application for — Application for judicial review to quash decision of Minister in exempting period of 153 days for calculation of date of delivery of vacant possession of properties pursuant to s 38C of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('the COVID-19 Act') — Whether application to Minister under sub-s 38C(3) of the COVID-19 Act was made before or after expiry of time for delivery of vacant possession or completion of common facilities specified under an 'agreement' — Whether decision of Minister tainted with illegality — Whether Minister ought to give purchasers right to be heard — Whether failure of Minister to accord purchasers a right to be heard tantamount to procedural impropriety — Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 s 38C

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The first respondent in the present application was the Minister of Housing and Local Government ('the Minister') whereas the second respondent was the developer of a residential project ('the residential project'). The applicants were the purchasers of parcels in the said residential project. The purchasers had individually entered into a sale and purchase agreement ('the SPA') with the developer for their respective properties. In the present case, the court had granted the purchasers' application for leave to commence judicial review proceedings for the following reliefs: (a) an order of certiorari to quash the approval in the letter dated 11 April 2022 exempting 153 days ie, from 1 June 2021 to 31 October 2021 for the calculation of the date for delivery of vacant possession under the SPA; and (b) a declaration that the said exemption was null and void being ultra vires s 38C which was introduced in the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('the COVID-19 Act') vide the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Amendment) Act 2022. The issue arose in the present judicial review proceedings was whether the application to the Minister under sub-s 38C(3) of the COVID-19 Act was made before or after the expiry of the time for delivery of vacant possession or the completion of common facilities specified under an 'agreement'.

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Held, allowing both the reliefs sought by the applicants:

(1) Sub-section 38C(2) of the COVID-19 Act provided that the developer was required to submit an application to the Minister. Only one reason was acceptable to grant the exclusion during the stipulated period, and that was, if due to the measures prescribed, made, or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19, the developer was unable to deliver vacant possession of the property and delivery of the common facilities. However, a condition must be satisfied before an application to exclude any period of time could be considered. The condition was that the application must not be made after the expiry of the time for delivery of vacant possession, or the completion of the common facilities specified under the sale and purchase agreement (see paras 12–13).

(2) In the present case, the developer acknowledged that there was a delay in the submission of the application under s 38C of the COVID-19 Act. The developer admitted that the last day to deliver vacant possession on the calculation based on 48 months as per the SPA was 26 December 2021. The application was made by letter dated 24 January 2022. Therefore, the application was clearly made out of time. The Minister had no jurisdiction to consider the application and the period excluded granted to the developer by the Minister was ultra vires sub-s 38C(3) of the COVID-19 Act. The Minister ought to have rejected the application as it was made after the expiry of the time period for the delivery of vacant possession. The decision of the Minister was, in the circumstances, tainted with illegality and an order of certiorari was granted by the court to quash the same (see paras 20 & 22).

(3) The COVID-19 Act did not expressly provide for a right to be heard. This did not mean that the court was powerless. It was trite and established law that there was no necessity for a statute to expressly provide for such a right to be heard. The Minister, from the very power provided in s 38C of the COVID-19 Act, knew that his decision would adversely affect purchasers of the project. In the circumstances, he ought to have granted the purchasers the right to comment on the exclusion application. The failure by the Minister to accord the purchasers a right to be heard tantamount to procedural impropriety, justifying another basis for an order of certiorari be issued to quash the granting of the approval to exclude the period for the purpose of delivering vacant possession and as a direct result reducing the liquidated damages due to the purchasers (see paras 24–25 & 28).

[Bahasa Malaysia summary

Responden pertama dalam permohonan ini ialah Menteri Perumahan dan Kerajaan Tempatan ('Menteri') manakala responden kedua ialah pemaju bagi sebuah projek kediaman ('projek kediaman tersebut'). Pemohon-pemohon adalah pembeli-pembeli petak dalam projek kediaman tersebut.

Pembeli-pembeli telah menandatangani perjanjian jual beli ('SPA') secara individu dengan pemaju untuk hartanah masing-masing. Dalam kes ini, mahkamah telah membenarkan permohonan pembeli-pembeli untuk kebenaran bagi memulakan prosiding semakan kehakiman bagi relif-relif berikut: (a) perintah certiorari untuk membatalkan kelulusan dalam surat bertarikh 11 April 2022 mengecualikan 153 hari iaitu daripada 1 Jun 2021 hingga 31 Oktober 2021 untuk pengiraan tarikh penyerahan milikan kosong di bawah SPA tersebut; dan (b) pengisytiharan bahawa pengecualian tersebut adalah terbatal dan tidak sah kerana ultra vires s 38C yang telah diperkenalkan dalam Akta Langkah-Langkah Sementara bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19) 2020 ('Akta COVID-19') melalui Akta Langkah-Langkah Sementara bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19) (Pindaan) 2022. Isu yang timbul dalam prosiding semakan kehakiman semasa ialah sama ada permohonan kepada Menteri di bawah sub-s 38C(3) Akta COVID-19 telah dibuat sebelum atau selepas tamat masa penyerahan milikan kosong atau penyiapan kemudahan bersama yang dinyatakan di bawah 'perjanjian'.

Diputuskan, membenarkan kedua-dua relif yang dipohon oleh pemohon-pemohon:

(1) Subseksyen 38C(2) Akta COVID-19 menetapkan bahawa pemaju dikehendaki mengemukakan permohonan kepada Menteri. Hanya satu sebab yang boleh diterima untuk memberikan pengecualian dalam tempoh yang ditetapkan, dan itu adalah, jika disebabkan oleh langkah-langkah yang ditetapkan, dibuat atau diambil di bawah Akta Pencegahan dan Pengawalan Penyakit Berjangkit 1988 untuk mengawal atau mencegah penyebaran COVID-19, pemaju tidak dapat menyerahkan milikan kosong hartanah tersebut dan penyerahan kemudahan bersama. Walau bagaimanapun, satu syarat mesti dipenuhi sebelum permohonan untuk mengecualikan apa-apa tempoh masa boleh dipertimbangkan. Syaratnya ialah permohonan tersebut tidak boleh dibuat selepas tamat tempoh penyerahan milikan kosong, atau penyiapan kemudahan bersama yang dinyatakan di bawah perjanjian jual beli (lihat perenggan 12–13).

(2) Dalam kes semasa, pemaju mengakui bahawa terdapat kelewatan dalam penyerahan permohonan di bawah s 38C Akta COVID-19. Pemaju mengakui hari terakhir penyerahan milikan kosong pada pengiraan berdasarkan 48 bulan mengikut SPA tersebut adalah pada 26 Disember 2021. Permohonan tersebut dibuat melalui surat bertarikh 24 Januari 2022. Oleh itu, permohonan tersebut jelas dibuat di luar masa. Menteri tidak mempunyai bidang kuasa untuk mempertimbangkan permohonan tersebut dan tempoh yang dikecualikan yang diberikan kepada pemaju oleh Menteri adalah ultra vires sub-s 38C(3) Akta COVID-19. Menteri sepatutnya menolak permohonan tersebut kerana

ia dibuat selepas tamat tempoh penyerahan milikan kosong. Keputusan Menteri, dalam keadaan tersebut, dicemari dengan kepenyalahan undang-undang dan perintah certiorari telah diberikan oleh mahkamah untuk membatalkan keputusan tersebut (lihat perenggan 20 & 22).

(3) Akta COVID-19 tidak secara jelas memperuntukkan hak untuk didengari. Ini tidak bermakna mahkamah tidak mempunyai kuasa. Ia adalah undang-undang yang mantap dan ditetapkan bahawa tidak ada keperluan bagi sesuatu statut untuk memperuntukkan secara jelas hak untuk didengar sedemikian. Menteri, daripada kuasa yang diperuntukkan dalam s 38C Akta COVID-19, tahu bahawa keputusannya akan memberi kesan buruk kepada pembeli-pembeli projek tersebut. Dalam keadaan tersebut, beliau sepatutnya memberi pembeli-pembeli tersebut hak untuk memberikan ulasan mengenai permohonan pengecualian tersebut. Kegagalan Menteri untuk memberikan pembeli-pembeli tersebut hak untuk didengar berjumlah kepada ketidakwajaran prosedur, mewajarkan asas lain bagi perintah certiorari dikeluarkan untuk membatalkan pemberian kelulusan untuk mengecualikan tempoh bagi tujuan penyerahan milikan kosong dan sebagai kesan langsung, mengurangkan ganti rugi tertentu yang perlu dibayar kepada pembeli-pembeli (lihat perenggan 24–25 & 28).]

Cases referred to

Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)
Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor v Ang Ming Lee & Ors and other appeals [2018] 4 MLJ 545, CA (folld)
Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721, FC (refd)

Legislation referred to

Housing Development (Control and Licensing) Regulations 1989 Schedules G, H, I, J
Prevention and Control of Infectious Diseases Act 1988
Rules of Court 2012 O 53
Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ss 35, 35(1), (2), (3), 38A(a), 38C, 38C(1), (2), (3), (4), (5)

Wong Kok Leong (with Wong Renn Xin) (KL Wong) for the applicant.
Liew Horng Bin (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
Ee Kah Fuk (with Hiew Yee Peng) (KF Ee & Co) for the second respondent.

Amarjeet Singh J:

INTRODUCTION

[1] The applicants are purchasers of parcels in a residential project known as Aera Servis Residensi @ Aera ('the project'). The parcels are hereinafter known as 'the property'. The project consists of two blocks, Tower A and Tower B. The second respondent, Platinum Eminent Sdn Bhd is the developer of the project ('the developer'). The applicants had individually entered into a sale and purchase agreement with the developer for their respective properties ('the purchasers'). The first respondent is the Minister of Housing and Local Government ('the Minister').

[2] On 27th July 2022, the purchasers applied for leave to commence judicial review proceedings for the following reliefs:

(a) an order of certiorari to quash the approval in the letter dated 11 April 2022 exempting 153 days ie from 1 Jun 2021 to 31 October 2021 for the calculation of the date for delivery of vacant possession under the said respective sale and purchase agreements; and

(b) a declaration that the said exemption is null and void being ultra vires s 38C which was introduced in the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('the COVID-19 Act') vide the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Amendment) Act 2022 ('the COVID-19 Amendment Act').

[3] Leave was granted to commence judicial review proceedings for the reliefs prayed for. The judicial review proceedings are on a very narrow point ie to quash the decision made by the Minister to exempt 153 days for the calculation of the date for delivery of vacant possession of the property and delivery of the common facilities from the period provided in the sale and purchase agreements. On the conclusion of the substantive hearing on 6 November 2023, I allowed both the reliefs sought.

[4] The reasons for my decision are as stated below.

BACKGROUND

[5] The sale and purchase agreements entered into between the developer and the purchasers were as the prescribed Schedule H form under the Housing Development (Control and Licensing) Regulations 1989 ('the HDR'). The Schedule provides that vacant possession of the properties and common facilities shall be delivered by the developer to the purchaser within 36 months.

[6] In a letter dated 24 January 2017, an extension of 12 months was granted ie 36 months to 48 months to deliver vacant possession of the properties and to complete the common facilities. The purchasers executed the sale and purchase agreements within the time frame of 48 months without protest or any reservation. The legitimacy of this extension is not the subject matter for this judicial review proceedings. It is not for this court to go beyond what is sought and pleaded in the O 53 statement.

[7] Subsequently, in a letter dated 24 March 2021, the developer wrote to the purchasers informing them that the Minister had on 3 March 2021 granted to the developer a period from 18 March 2020 to 31 August 2020 (totaling 167 days) to be excluded when calculating the time period for delivery of vacant possession and completion of common facilities ('the one excluded period'). This was followed by a letter dated 21 January 2022, wherein the developer informed the purchasers that the Minister had on 6 December 2021 granted an extension of the excluded period ie from 1 September 2020 to 31 December 2020 (totaling 122 days) from the calculation of the time period for delivery of vacant possession and completion of common facilities ('the second excluded period').

[8] The one excluded period was by operation of law in accordance with sub-s 35(1) of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('the COVID-19 Act'). The second exempted period was granted by the Minister upon an application made by the developer pursuant to sub-ss 35(2) and (3) of the COVID-19 Act. In this regard, s 35 of the COVID-19 Act is reproduced to appreciate the purpose of the provision:

> (1) Notwithstanding any agreement entered into between the purchaser and the developer, the period from 18 March 2020 to 31 August 2020 shall be excluded from the calculation of —
>
> (a) the time for delivery of vacant possession of a housing accommodation; and
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> (b) the liquidated damages for the failure of the developer to deliver vacant possession of a housing accommodation.
>
> (2) The developer may apply to the Minister for an extension of the period referred to in subsection (1).
>
> (3) Upon considering the application under subsection (2), the Minister may, if the Minister is satisfied that additional time is required by the developer to deliver vacant possession by written direction grant to the developer an extension period of up to 31 December 2020 to deliver vacant possession and such extension shall have the same effect as the period excluded in subsection (1).

A THE SUBJECT MATTER OF THE INSTANT APPLICATION

[9] By a letter dated 28 April 2022, the developer informed the purchasers that the Minister had on 11 April 2022 granted to the developer a period from 1 June 2021 to 31 October 2021 (totaling 153 days) to be excluded in the B calculation of the time period for delivery of vacant possession and completion of common facilities ('the third excluded period'). This third excluded period was granted upon the application made by the developer to the Minister pursuant to s 38C of the COVID-19 Act 2020. Section 38C was a new section C inserted by the COVID-19 Amendment Act which came into force on 14 January 2022.

[10] Dissatisfied with the said decision of the Minister in granting the third excluded period, the purchasers filed this judicial review application to quash D the exemption granted on the following grounds:

(a) the developer filed the application after the time period had lapsed;

(b) the purchasers were not given a right to be heard;

(c) the minister took into account irrelevant factors; E

(d) the minister did not consider relevant factors; and

(e) the minister did not give reasons for his decision.

F ANALYSIS AND DECISION

[11] The third excluded period was granted by the Minister pursuant to his powers conferred by sub-s 38C(1) of the COVID-19 Act which read:

> In relation to a housing development, notwithstanding any agreement entered into G between a developer and a purchaser, *the developer may apply to the Minister for any period from 1 January 2021 to 31 December 2021 to be excluded from the calculation of the time for delivery of vacant possession of a housing accommodation or completion of common facilities*, as the case may be, in the housing development.

H **[12]** Subsection 38C(2) of the COVID-19 Act provides that the developer is required to submit an application to the Minister. Only one reason was acceptable to grant the exclusion during the stipulated period, and that is, if due to the measures prescribed, made, or taken under the Prevention and I Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19, the developer was unable to deliver vacant possession of the property and delivery of the common facilities. This is made plain and clear by the unambiguous words of the sub-s 38C(2) of the COVID-19 Act which read as follows:

> Upon considering the application under subsection (1), the Minister may exclude any period from 1 January 2021 to 31 December 2021 from the calculation of time for delivery of vacant possession of a housing accommodation or completion of common facilities *if the Minister is satisfied that due to measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19, the developer was unable to deliver vacant possession of a housing accommodation or complete the common facilities in accordance with the agreement*.

[13] However, a condition must be satisfied before an application to exclude any period of time can be considered. It is this. The application must not be made after the expiry of the time for delivery of vacant possession or the completion of the common facilities specified under the sale and purchase agreement. This is the main plank of the purchasers' case. They claim that there was non-compliance with sub-s 38C(3) of the COVID-19 Act and therefore the Minister has no power to consider the application for the exclusion of the time period sought. It was argued that the developer was required to make the application before the expiry of the time period for delivery of vacant possession.

[14] A perusal of the provision reveals that the Minister has no power to consider an application if the said application for exclusion of time is made after the expiry of the time for delivery of vacant possession or the completion of common facilities. Subsection 38C(3) of the COVID-19 Act states this in no uncertain terms as follows:

> The Minister shall not consider an application under subsection (1) if the application is made after the expiry of the time for delivery of vacant possession or the completion of common facilities specified under the agreement.

[15] The words 'shall not consider an application' are mandatory. The plain meaning of the words admits no exception. The provision is not ambiguous and certainly does not give rise to any other interpretation. It is trite that the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used — the court is not to read words into the statute unless a clear reason for it is to be found in the statute itself (*Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721).

[16] Thus, an approval given to exclude a period of days pursuant to an application made after the expiry of the time for delivery of vacant possession or the completion of common facilities specified under the sale and purchase agreement would be illegal being ultra vires the clear and unambiguous provision of sub-s 38C(3) of the COVID-19 Act. The Minister does not have

A the power to approve such an application and if granted such approval is liable to be quashed by an order of certiorari.

[17] The other condition for a developer to make such an application is provided under sub-s 38C(4) of the COVID-19 Act. The condition is that the B first sale and purchase agreement for the project was entered into before 31 May 2021. This condition was satisfied and was not an issue before me. The importance of the Minister granting an application in respect of any exclusion period is stated plainly in sub-s 38C(5) of the COVID-19 Act, in that, such C excluded period if granted will be taken into account in reducing the liquidated damages where there is a failure of the developer to deliver vacant possession of property and delivery of the common facilities within the time stipulated, or extended or excluded as the case may be.

D WHETHER THE MINISTER WAS CORRECT IN LAW TO EXCLUDE TIME

[18] The only issue before me is whether the application to the Minister under sub-s 38C(3) of the COVID-19 Act was made before or after the expiry E of the time for delivery of vacant possession or the completion of common facilities specified under an 'agreement'. For completeness, the word 'agreement' is defined in sub-s 38A(a) of the COVID-19 Act to mean, 'an agreement for a contract of sale for the sale and purchase of housing accommodation in the forms prescribed in Schedules G, H, I and J of the F Housing Development (Control and Licensing) Regulations 1989'.

[19] It is the purchaser's case that the application for the third excluded period was made after the expiry of the time period for delivery of vacant possession as specified under the agreement. Given the scope of the application G before me, I am not to venture beyond what is pleaded in the O 53 statement. The time period for the delivery of vacant possession in the instant case is 48 months from the date of the sale and purchase agreements.

[20] The developer acknowledges that there was a delay in the submission of H the application under s 38C of the COVID-19 Act. The developer admitted that the last day to deliver vacant possession on the calculation based on 48 months as per the sale and purchase agreement was 26 December 2021. The application was made by letter dated 24 January 2022 and I only need to reproduce the letter, the relevant part, which read as follows:

I SURAT PERMOHONAN PENGECULIAN TEMPOH SERAHAN KOSONG AKIBAT PERINTAH KAWALAN PERGERAKAN BAGI PERMAJUAN YANG TERJEJAS KERNA PENULARAN WABAK COVID-19 (PKP 3.0 1 JUN 2021–31 OKTOBER 2021).

Dengan segala hormatnya merujuk kepada projek tersebut di atas, di sini Pihak Pemaju

kami ingin memohon jasa baik YB Menteri memberi pertimbangan atas kelewatan permohonan pengecualian tempoh serahan kosong PKP 3.0 yang dikemukakan selepas tarikh pada 26 Disember 2021.

Pihak Pemaju kami ingin memberi penjelasan berkenaan kelewatan permohonan pengecualian tempoh serahan kosong.

Dalam situasi Covid-19 yang ketara, pejabat urusan pihak pemaju kami telah ditutup sementara untuk menangani Covid-19 yang semakin berleluasa di kalangan pekerja kami. Oleh itu, pihak pengurusan memutuskan pejabat urusan ditutup sepenuhnya dari 23 Disember 2021 hingga 5 Januari 2022 yang mengena semua pekerja 'Bekerja Dari Rumah' dan menerusi notis kedua syarikat memutuskan penyambungan penutupan pejabat urusan dari 6 Januari 2022 hingga 20 Januari 2022. Dalam masa ini, semua pekerja tidak diberi akses ke pejabat untuk sebarang urusan bersemuka. Dilampirkan memo dalaman bertarikh 15 Disember 2021 dan 28 Disember 2021 untuk rujukan tuan.

Dengan ini, kebanyakan urusan pejabat tergendala dan tidak dapat dikendalikan mengikut jadual waktu yang ditetapkan. Ini termasuk permohonan pengecualian tempoh serah kosong PKP 3.0. Pihak pemaju kami berjaya memohon online Google Form Borang A (v2) (PKP 3.0, Tahun 2021) pada 19 Januari 2022 seperti yang dilampirkan Bersama.

Pejabat urusan pihak kami secara resminya terbuka pada 21 Januari 2022. Dilampirkan memo dalaman bertarikh 13 Januari 2022.

Untuk makluman YB Menteri, kebanyakan pekerja yang terlibat secara langsung mengalami masalah kesihatan, dan memohon 'sick leave' ketika proses penyediaan surat permohonan tersebut. Ramai yang khuatir dan memutuskan tidak berani bersemuka di pejabat urusan. Oleh itu, proses penyediaan dokumen-dokumen dan tandatangan daripada pihak berkenaan mengambil masa yang lebih daripada dijangka.

Dengan ini, pihak pemaju kami berharap pihak YB Menteri boleh memberi pertimbangan sewajarnya ke atas kelewatan permohonan kami.

[21] The reasons given for the delay in making the application are not relevant given the mandatory requirement of sub-s 38C(3) of the COVID-19 Act. Further, the evidence establishes that the construction of the project according to the architect's certificate issued in January 2021 was that the construction was 80% completed. Block A was completed on 7 January 2021 while Block B was completed on 14 January 2021. The certificate of completion and compliance ('CCC') was the only outstanding issue. The application did not include the CCC in the application. Instead, the application was speaking of construction issues in the following words:

FAKTOR SOP — Arahan pelaksanaan SOP oleh MKN menyebabkan pemaju dan kontraktor mengalami masalah apabila perlu mengurangkan jumlah pekerja di tapak dengan menjalankan swab test serta saringan kedua kepada semua pekerja tapak menjadikan kerja di tapak tidak lagi mengikut jadual perancangan asal. Penguatkuasaan Akta 446 (Standard Minimum Perumahan dan Kediaman Pekerja)

menyebabkan kontraktor memerlukan masa tambahan untuk memenuhi keperluan akta tersebut seterusnya dapat beroperasai seperti dijadualkan.

FAKTOR KERJA LUARAN DAN INFRASTRUKTUR — Di tapak projek kini sedang menjalankan kerja infrastruktur massive seperti kerja pemasangan kabel TNB I kerja berkaitan keperluan syarikat air atau pembentungan, atau terdapat kerja-kerja infra 'work outside boundary' mengikut keperluan syarat kelulusan pelan pembangunan bagi memperolehi CCC dari agensi teknikal.

FAKTOR BEKALAN BAHAN BINAAN — Bahan binaan yang dibekalkan dari luar negara seperti lif, penyejuk, genset dan Iain-Iain peralatan menghadapi masalah penghantaran. Terdapat juga bahan binaan yang diambil dari negeri lain yang memerlukan banyak prosedur dan SOP untuk dipatuhi menyebabkan jadual penghantaran terpaksa diubah dan dijadualkan semula.

FAKTOR PEKERJA — Masalah mendapatkan pekerja mahir.

[22] For the above reasons, the application was clearly made out of time. The Minister had no jurisdiction to consider the application and the period excluded granted to the developer by the Minister is ultra vires sub-s 38C(3) of the COVID-19 Act. The Minister ought to have rejected the application as it was made after the expiry of the time period for the delivery of vacant possession. The decision of the Minister was in the circumstances tainted with illegality and an order of certiorari was granted by me to quash the same.

RIGHT TO BE HEARD

[23] The second reason, independent of the above reason, is that the purchasers were not given a right to be heard prior to the decision made by the Minister granting the third excluded period. The Minister, from the very power provided in s 38C of the COVID-19 Act, knows that his decision will adversely affect purchasers of the project. In the circumstances, he ought to have granted the purchasers the right to comment on the exclusion application.

[24] The COVID-19 Act does not expressly provide for such a right to be heard. This does not mean that the court is powerless. It is trite and established law that there is no necessity for a statute to expressly provide for such a right to be heard. The landmark case on the subject is *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 where Raja Azlan Shah FCJ (as His Highness then was) in delivering the judgment of the Federal Court said:

> In particular, the silence of the statute affords no argument for excluding the rule, for the 'justice of the common law' will supply the omission of the Legislature.
>
> In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labeled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing. But the hearing may take many forms and strict insistence upon an

inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. ... The great need is to deal efficiently and fairly, rather than to preserve all the accoutrements of the courtroom; the considerations of basic fairness are paramount.

[25] *Ketua Pengarah Kastam v Ho Kwan Seng* has been consistently applied till today. A recent decision on the subject is the decision of *Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor v Ang Ming Lee & Ors and other appeals* [2018] 4 MLJ 545 where the Court of Appeal held as follows:

[24] The final issue raised before us in arguments was whether the purchasers ought to have been given a right of hearing prior to the decision made by the controller and/or Minister. In this respect, we note that the purpose of the Act was to protect the interest of the purchasers. As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished, we agree that the purchasers must be given an opportunity to be heard prior to any decision made.

[25] As the purchasers comprise a group which can easily be ascertained, they should at least be notified of the developer's application for any extension of time to complete the project and be given a reasonable period of time to state their views before any such decision is taken. As no such right to be heard was afforded to the purchasers, it is our judgment that the decision made in this case, whether by the Controller or Minister, was null and void and of no effect and should accordingly be set aside.

[26] I find the reasoning of the Court of Appeal compelling and apply the same to the fact situation before me. In fairness, the minister's decision should have afforded an opportunity for the purchasers to be heard before any decision was made to exclude the period applied for under sub-s 38C(3) of the COVID-19 Act. After all, it is trite that the purpose of the Schedule H Form sale and purchase agreement was to protect the interest of the purchasers. The decision of the Minister has the effect of depriving the purchasers of their right to claim liquidated damages due to them.

[27] I am of the view, that the failure by the Minister to accord the purchasers a right to be heard on the application the period of time under sub-s 38C(1) read with sub-s 38C(3) of the COVID-19 Act tantamounts to procedural impropriety, justifying another basis for an order of certiorari be issued to quash the granting of the approval to exclude the period for the purpose of delivering vacant possession and as a direct result reducing the liquidated damages due to the purchasers.

A CONCLUSION

[28] The aforesaid grounds are sufficient to dispose of this judicial review application. As such, there was no need for me to determine the other issues raised by the parties.

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Both reliefs sought by applicants allowed.

Reported by Dzulqarnain Ab Fatar

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